



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA-R06-OAR-2021-0661; FRL-9262-01-R6]

National Emission Standards for Hazardous Air Pollutants; Delegation of Authority to Arkansas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Arkansas Department of Energy and Environment, Division of Environmental Quality (DEQ) has submitted a request to update the delegation and approval of its program for the implementation and enforcement of certain National Emission Standards for Hazardous Air Pollutants (NESHAP) promulgated under the Clean Air Act (CAA), as provided for under the delegation mechanism previously approved by the Environmental Protection Agency (EPA). The EPA is proposing to approve DEQ's requested update of its NESHAP delegation. If finalized as proposed, the delegation will only encompass sources subject to one or more Federal section 112 standards which are also subject to the requirements of the Title V operating permits program.

DATES: Written comments on this proposed rule must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R06-OAR-2021-0661, at <https://www.regulations.gov> or via email to barrett.richard@epa.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is

considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, please contact Rick Barrett, 214-665-7227, barrett.richard@epa.gov. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

Docket: The index to the docket for this action is available electronically at <https://www.regulations.gov>. While all documents in the docket are listed in the index, some information may not be publicly available due to docket file size restrictions or content (e.g., CBI).

FOR FURTHER INFORMATION CONTACT: Rick Barrett, EPA Region 6 Office, ARPE, (214) 665-7227, barrett.richard@epa.gov. Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office will be closed to the public to reduce the risk of transmitting COVID-19. We encourage the public to submit comments via <https://www.regulations.gov>, as there will be a delay in processing mail and no courier or hand deliveries will be accepted. Please call or e-mail the contact listed above if you need alternative access to material indexed but not provided in the docket.

SUPPLEMENTARY INFORMATION: Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

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I. What does this action do?

The EPA is proposing to approve an update to the delegation of the implementation and enforcement of certain NESHAP to DEQ. If finalized, the delegation will provide DEQ with the primary responsibility to implement and enforce the delegated standards. See sections VI and VII, below, for a discussion of which standards are being delegated and which are not being delegated.

II. What is the authority for delegation?

Section 112(l) of the CAA and 40 CFR part 63, subpart E, authorize the EPA to delegate authority for the implementation and enforcement of NESHAP to a State or local agency that satisfies the statutory and regulatory requirements in subpart E. The NESHAP are codified at 40 CFR parts 61 and 63. This action regards the standards in 40 CFR part 63 only.

III. What criteria must Arkansas's program meet to be approved?

Section 112(l)(5) of the CAA requires the EPA to disapprove any program submitted by a State for the delegation of NESHAP if the EPA determines that:

(A) the authorities contained in the program are not adequate to assure compliance by the sources within the state with respect to each applicable standard, regulation, or requirement established under section 112;

(B) adequate authority does not exist, or adequate resources are not available, to implement the program;

(C) the schedule for implementing the program and assuring compliance by affected sources is not sufficiently expeditious; or

(D) the program is otherwise not in compliance with the guidance issued by the EPA under section 112(l)(2) or is not likely to satisfy, in whole or in part, the objectives of the CAA.

In carrying out its responsibilities under section 112(l), the EPA promulgated regulations at 40 CFR part 63, subpart E setting forth criteria for the approval of submitted programs. For example, in order to obtain approval of a program to implement and enforce Federal section 112 rules as promulgated without changes (straight delegation), a state must demonstrate that it meets the criteria of 40 CFR 63.91(d). 40 CFR 63.91(d)(3) provides that interim or final Title V program approval will satisfy the criteria of 40 CFR 63.91(d).¹ The NESHAP delegation for Arkansas, as it applies to Title V sources, was most recently approved on November 12, 2014 (79 FR 67073).

IV. How did DEQ meet the NESHAP program approval criteria?

The EPA granted final interim approval for the Arkansas Operating Permit Program under part 70 in a rulemaking published September 8, 1995. 60 FR 46771. In the *Federal Register* notice proposing interim approval of the Arkansas Operating Permit Program, the EPA discussed the delegation of unchanged part 63 standards as they apply to part 70 sources and noted that Arkansas plans to use the mechanism of incorporation by reference to adopt

¹ Some NESHAP do not require a source to obtain a Title V permit (e.g., certain area sources that are exempt from the requirement to obtain a Title V permit). For these non-Title V sources, the EPA believes that the State must assure the EPA that it can implement and enforce the NESHAP for such sources. See 65 FR 55810, 55813 (September 14, 2000).

unchanged part 63 standards into its regulations. *See* 59 FR 47828, 47830 (September 19, 1994).

In an October 9, 2001, rulemaking, the EPA took final action to fully approve the Arkansas Operating Permit Program. 66 FR 51312. In accordance with 40 CFR 63.91(d), the up-front approval criteria for delegation of unchanged part 63 standards as requested by DEQ have been met. However, the EPA's October 9, 2001, *Federal Register* notice failed to discuss the *mechanism* associated with delegation of the part 63 standards for sources subject to the part 70 program. As discussed above, sources subject to the part 70 program are those sources that are operating pursuant to a part 70 permit issued by the State, local agency, or the EPA. Sources not subject to the part 70 program are those sources that are not required to obtain a part 70 permit from either the State, local agency, or the EPA (see 40 CFR 70.3); e.g., exempted area sources. As stated above, the CAA section 112(l) requirements for approval of the Arkansas program for straight delegation were satisfied when the EPA granted approval of the Arkansas Operating Permit Program. The EPA's approval also met the up-front criteria set forth in 40 CFR 63.91(d).

However, since DEQ implements and enforces unchanged part 63 standards ("straight delegation") through its EPA-approved Title V Operating Permit Program, there were several issues which needed to be separately addressed and resolved in order to ensure the requirements for delegation under CAA section 112(l) and 40 CFR part 63, subpart E were met. *See also* 65 FR 55813 (September 14, 2000). The EPA believes all such issues were addressed in the Memorandum of Agreement (MOA), dated September 17, 2014, executed by the State and the EPA, a copy of which has been included in the docket for this rulemaking. DEQ implements and enforces part 63 standards applicable to Title V sources required to obtain a part 70 permit by including the applicable part 63 standards in Title V operating permits, in accordance with the procedures set forth in the MOA. The permit must be effective prior to the first substantial compliance date for all future new and revised part 63 standards, unless DEQ has notified the EPA in advance that it does not intend to accept delegation for implementation or enforcement, as discussed in the MOA referenced above. Adequate resources will be obtained through monies

from the State's Title V program that can be used to fund acceptable Title V activities. Upon promulgation of a new or revised part 63 standard, DEQ will immediately begin activities necessary for timely implementation of the standard. These activities will involve identifying sources subject to the applicable requirements and notifying these sources of the applicable requirements. Nothing in the Arkansas program for straight delegation is contrary to Federal guidance.

Under 40 CFR 63.91(a), once a state has satisfied the up-front approval criteria, it needs only to reference the previous demonstration and reaffirm that it still meets the criteria for any subsequent submittals for delegation of the section 112 standards. As stated in its October 27, 2021, supplemental letter, DEQ has affirmed that it still meets the up-front approval criteria and referenced the previous demonstration.

V. How are sources subject to certain listed standards going to be handled since DEQ did not accept delegation of these standards?

In its June 7, 2010, request for delegation of authority and approval of the mechanism used to implement and enforce the delegated part 63 standards, Arkansas noted that it was not requesting delegation of part 63 standards for area sources not required to obtain a Title V (part 70) permit. Arkansas also noted that it was not requesting delegation of the accidental release requirements under CAA section 112(r). Since DEQ is not accepting delegation of these standards, the EPA will be the primary enforcement authority for those standards. However, these undelegated part 63 standards remain requirements of the sources subject to these standards; therefore, DEQ must ensure that the applicable part 63 standards are included in the appropriate federally enforceable permit for subject sources, and sources subject to these standards must continue to comply with their requirements.

VI. What is being delegated?

By letter dated September 28, 2020, and supplemental letters dated June 29, 2021, and October 27, 2021, the EPA received requests from DEQ to update its existing NESHAP

delegation. With certain exceptions noted in section VII of this document, DEQ's request includes certain NESHAP promulgated by the EPA at 40 CFR part 63, as amended between September 17, 2014, and July 31, 2020. More specifically, DEQ is requesting to update its delegation and approval to implement and enforce 40 CFR part 63 standards as they apply to part 70 major sources, and only to those area sources subject to the Title V (part 70) permitting requirements.

VII. What is not being delegated?

DEQ has not requested, nor would this rulemaking if approved as proposed, delegate the enforcement and implementation of 40 CFR part 63 standards to DEQ that would apply to area sources which do not require a Title V (part 70) permit. In addition, the EPA regulations provide that we cannot delegate to a State any of the Category II Subpart A authorities set forth in 40 CFR 63.91(g) (2). These include the following provisions: § 63.6(g), Approval of Alternative Non-Opacity Standards; § 63.6(h)(9), Approval of Alternative Opacity Standards; § 63.7(e)(2)(ii) and (f), Approval of Major Alternatives to Test Methods; § 63.8(f), Approval of Major Alternatives to Monitoring; and § 63.10(f), Approval of Major Alternatives to Recordkeeping and Reporting. In addition, some part 63 standards have certain provisions that cannot be delegated to the states. Furthermore, no authorities are being proposed for delegation that require rulemaking in the *Federal Register* to implement, or where Federal oversight is the only way to ensure national consistency in the application of the standards or requirements of CAA section 112. Finally, CAA section 112(r), the accidental release program authority, is not being proposed for delegation by this action.

If this action is finalized as proposed, all of the inquiries and requests concerning implementation and enforcement of the excluded standards in the State of Arkansas should be directed to the EPA Region 6 Office.

The EPA is proposing a determination that the NESHAP program submitted by Arkansas meets the applicable requirements of CAA section 112(l)(5) and 40 CFR part 63, subpart E.

VIII. How will statutory and regulatory interpretations be made?

If this NESHAP delegation update is finalized as proposed, the DEQ will obtain concurrence from the EPA on any matter involving the interpretation of section 112 of the Clean Air Act or 40 CFR part 63 to the extent that implementation, administration, or enforcement of those provisions are not covered by prior EPA determinations or guidance.

IX. What information must DEQ provide to the EPA?

DEQ must provide any additional compliance related information to the EPA, Region 6, Office of Enforcement and Compliance Assurance within 45 days of a request under 40 CFR 63.96(a). In receiving delegation for specific General Provisions authorities, DEQ must submit to EPA Region 6, on a semi-annual basis, copies of determinations issued under these authorities. *See* 40 CFR 63.91(g)(1)(ii). For part 63 standards, these determinations include: Section 63.1, Applicability Determinations; Section 63.6(e), Operation and Maintenance Requirements—Responsibility for Determining Compliance; Section 63.6(f), Compliance with Non-Opacity Standards—Responsibility for Determining Compliance; Section 63.6(h), Compliance with Opacity and Visible Emissions Standards—Responsibility for Determining Compliance; Sections 63.7(c)(2)(i) and (d), Approval of Site-Specific Test Plans; Section 63.7(e)(2)(i), Approval of Minor Alternatives to Test Methods; Section 63.7(e)(2)(ii) and (f), Approval of Intermediate Alternatives to Test Methods; Section 63.7(e)(iii), Approval of Shorter Sampling Times and Volumes When Necessitated by Process Variables or Other Factors; Sections 63.7(e)(2)(iv), (h)(2), and (h)(3), Waiver of Performance Testing; Sections 63.8(c)(1) and (e)(1), Approval of Site-Specific Performance Evaluation (Monitoring) Test Plans; Section 63.8(f), Approval of Minor Alternatives to Monitoring; Section 63.8(f), Approval of Intermediate Alternatives to Monitoring; Section 63.9 and 63.10, Approval of Adjustments to Time Periods for Submitting Reports; Section 63.10(f), Approval of Minor Alternatives to Recordkeeping and Reporting; and Section 63.7(a)(4), Extension of Performance Test Deadline.

X. What authority does the EPA have?

We retain the right, as provided by CAA section 112(l)(7) and 40 CFR 63.90(d)(2), to enforce any applicable emission standard or requirement under section 112. In addition, the EPA may enforce any federally approved State rule, requirement, or program under 40 CFR 63.90(e) and 63.91(c)(1)(i). The EPA also has the authority to make certain decisions under the General Provisions (subpart A) of part 63. We are proposing to delegate to the DEQ some of these authorities, and retain others, as explained in sections VI and VII above. In addition, the EPA may review and disapprove State determinations and subsequently require corrections. *See* 40 CFR 63.91(g)(1)(ii). EPA also has the authority to review DEQ's implementation and enforcement of approved rules or programs and to withdraw approval if we find inadequate implementation or enforcement. *See* 40 CFR 63.96.

Furthermore, we retain the authority in an individual emission standard that may not be delegated according to provisions of the standard. Finally, we retain the authorities stated in the October 9, 2001, rulemaking, where the EPA took final action to fully approve the Arkansas Operating Permit Program. *See* 66 FR 51312.

The updated 40 CFR part 63 standards being requested by DEQ are discussed in their request letter and supplemental letters to EPA, as noted in section VI above. A copy of each of these three letters is included in the docket for this action. A table of the updated NESHAP standards being requested may be found in the docket for this action. The table also shows the authorities that cannot be delegated to any state or local agency.

XI. Should sources submit notices to the EPA or DEQ?

For the delegated part 63 standards and authorities covered by this proposed action, if finalized, sources would submit all of the information required pursuant to the general provisions and the relevant subpart(s) of the delegated NESHAP (40 CFR part 63) directly via electronic submittal to online EPA database portals that are specified in each rule, and also as paper submittals to the ADEQ at the following address: The Arkansas Department of Energy and Environment, Division of Environmental Quality, 5301 Northshore Drive, North Little Rock,

Arkansas 72118-5317. The DEQ is the primary point of contact with respect to the delegated NESHAP. The EPA Region 6 proposes to waive the requirement that courtesy notifications and reports for delegated standards be submitted to the EPA in addition to DEQ in accordance with 40 CFR 63.9(a)(4)(ii) and 63.10(a)(4)(ii).² For those standards and authorities not delegated as discussed above, sources must continue to submit all appropriate information to the EPA.

XII. How will unchanged authorities be delegated to DEQ in the future?

Consistent with the EPA regulations and guidance³, if this NESHAP delegation update is finalized as proposed, DEQ will only need to periodically submit a written request to EPA, Region 6, to update its approval of the delegation of authority to implement and enforce new or revised part 63 standards through its approved Title V permitting program. In such request, DEQ will reference the previous up-front approval demonstration, reaffirm that it still meets the up-front approval criteria, and identify the new or revised part 63 standards that will be delegated upon incorporation into Title V permits.

The EPA will respond in writing to the request and take action in the ***Federal Register*** to inform the public and affected sources of the EPA's decision, indicate where source notifications and reports should be sent, and to update 40 CFR 63.99(a)(4), amending the Arkansas table of delegated part 63 standards being implemented and enforced by DEQ.

XIII. Proposed action

In this action, because DEQ's request meets all requirements of CAA section 112(l) and 40 CFR 63.91, the EPA is proposing to approve their request for the updated delegation and the continued approval of the mechanism used to implement and enforce certain part 63 standards

² This waiver only extends to the submission of *copies* of notifications and reports; EPA does not waive the requirements in delegated standards that require notifications and reports be submitted to an electronic database (e.g., 40 CFR part 63, subpart HHHHHHHH).

³ See Hazardous Air Pollutants: Amendments to the Approval of State Programs and Delegation of Federal Authorities, Final Rule (65 FR 55810, September 14, 2000); and "Straight Delegation Issues Concerning Sections 111 and 112 Requirements and Title V," by John S. Seitz, Director of Air Quality Planning and Standards, EPA, dated December 10, 1993.

applicable to sources required to obtain a Title V (part 70) permit, as they existed through July 31, 2020.

As for the part 63 standards which have not yet been incorporated into permits, DEQ's authority to implement and enforce new and revised part 63 standards under this delegation becomes effective when this proposed action is finalized and after the issuance of the appropriate federally enforceable permit containing those standards. DEQ's authority to implement and enforce new and revised part 63 standards under this delegation will become effective according to the procedures outlined in the MOA, a copy of which is included in the docket for this rulemaking

Nothing in this action should be construed as permitting, allowing, or establishing a precedent for any future request for revision to the approved delegation. Each request for revision to the approved delegation shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

XIV. Statutory and Executive Order Reviews

Under the CAA, the Administrator has the authority to approve section 112(l) submissions that comply with the provisions of the Act and applicable Federal regulations. In reviewing section 112(l) submissions, the EPA's role is to approve state choices, provided that they meet the criteria and objectives of the CAA and of the EPA's implementing regulations. Accordingly, this proposed action would merely approve the State's request as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork

Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

List of Subjects

40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Date: November 17, 2021.

David Garcia,

Director, Air & Radiation Division, Region 6.

[FR Doc. 2021-25626 Filed: 11/23/2021 8:45 am; Publication Date: 11/24/2021]